APPENDIX

In the Supreme Court of the United States
OCTOBER TERM, 1967

No. 319

NUGENT KAUTZ, et al.,
PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON
Respondents

ON WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

PETITION FOR CERTIORARI FILED JUNE 30, 1967
CERTIORARI GRANTED DECEMBER 16, 1967

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APPENDIX TO THE BRIEFS

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COMPLAINT

Come now the plaintiffs, by and through their Attorney General, John J. O'Connell, and Assistant Attorneys General, Joseph L. Coniff and Mike Johnston, and for a claim against the defendants, state as follows:

I

The State of Washington is a sovereign state of the United States, and that the Departments of Fisheries and Game thereof are charged with the duty of enforcing its laws, rules and regulations relating to the preservation, conservation, and management of the food and game fishery resources of the state.

II

The defendants are citizens of the State of Washington and of the United States of America.

III

The Nisqually River is a river that forms a portion of the southern boundary of Pierce County in the State of Washington that sustains a large anadromous fish population.

IV

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River.

V

The defendants claim special privileges or immunities from the application of valid conservation laws

of the State of Washington, to which they are not legally entitled. By virtue of the claimed special privileges or immunities, the defendants have threatened and are fishing extensively in the Nisqually River with set nets and drift nets.

VI

As a result of the defendants' illegal net fishery, the anadromous fish runs of the Nisqually River will be virtually exterminated if said fishery is permitted to continue.

The plaintiffs have no adequate remedy at law and the public will suffer permanent irreparable injury from the acts of the defendants.

WHEREFORE plaintiffs pray that the court declare that the defendants are not entitled to any priviliges or immunities from the application of state conservation measures;

FURTHER, the plaintiffs pray that a temporary restraining order be issued enjoining the defendants from netting anadromous fish in the Nisqually River or any of its tributaries and directing the defendants not to hamper or molest in any way the anadromous fish runs of the Nisqually River;

FURTHER, that the court fix a time certain at which the defendants shall show cause why they should not be enjoined and restrained during the pendency of this action from netting the runs of andramous fish of the Nisqually River; and

FURTHER, that plaintiffs have judgment against the defendants permanently enjoining them from destroying the runs of anadromous fish of the Nisqually River system, and for such other relief as the court may deem just and reasonable.

ANSWER

Comes now the defendants and for answer to plaintiffs complaint admits and denies plaintiffs allegations as follows:

I

Answering Paragraph I of plaintiffs complaint the defendants admit the same.

II

Answering Paragraph II of plaintiffs complaint defendants admit that they are citizens of the United States, but deny that they are citizens of the State of Washington for all purposes.

III

Answering Paragraph III of plaintiffs complaint defendants admit the same.

IV

Answering Paragraph IV of plaintiffs complaint defendants have no knowledge of the allegations therein contained therefore deny the same.

V

Answering Paragraphs V and VI of plaintiff's complaint defendants deny the allegations therein contained.

WHEREFORE having fully answered the plaintiffs complaint the defendants pray that the same be dismissed.

MOTION AND AFFIDAVIT TO DISMISS

TO: STATE OF WASHINGTON and JOHN J. O'CONNELL, Attorney General.

Comes now Jack E. Tanner, attorney for the above named defendants and moves the court for an order of dismissal of the above entitled matter. This motion is based upon the grounds that Superior Court of Pierce County does not have jurisdiction over the persons or subject matter involved in this case.

/s/ JACK E. TANNER
Attorney for Defendants

STATE OF WASHINGTON, County of Pierce:

JACK E. TANNER, being first duly sworn upon oath, deposes and says:

That it is his information and belief that the defendants above named are descendants of the tribes, Puyallup and Nisqually, who were parties to the Medicine Creek Treaty of 1854, and as parties to that agreement between the United States and the Indian tribes the defendants claim all rights and privileges afforded to them by the Treaty which includes taking fish at all usual and accustomed grounds and stations on the Nisqually River.

JACK E. TANNER

STIPULATION

The following stipulation as to facts is entered into this 23rd day of June, 1965, between the plaintiffs and the individual defendants in the above-entitled action.

1) The defendants are successors in interest to the Nisqually Tribe of Indians which tribe is signatory to and entitled to rights under the Treaty of Medicine Creek (Kappler).

2) The boundaries of the Nisqually Indian Reservation are as shown on a map marked "Exhibit A" attached hereto and by reference incorporated herein.

3) The usual and accustomed fishing grounds (within the meaning of the Treaty of Medicine Creek, *supra*) of the Nisqually Tribe of Indians encompass the whole of the Nisqually River, and its tributaries downstream from the Nisqually Indian Reservation as described in Paragraph 2, above.

4) The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

5) If permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

6) The plaintiffs have expanded a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn. 2d 423 (1963)] that the plaintiffs' enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SUPERIOR COURT

This case having come on for hearing before the undersigned Judge, sitting without a jury on a stipulated statement of facts on the 12th day of August, 1965, the plaintiffs being represented by John J. O'Connell, Attorney General, and Joseph L. Coniff and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Jack Tanner, and the court having examined the stipulation of facts and heard the arguments of counsel and being fully advised in the premises, hereby makes the following Findings of Fact:

FINDINGS OF FACT

I

The defendants are successors in interest to the Nisqually Tribe of Indians which tribe is signatory to and entitled to rights under the Treaty of Medicine Creek (Kappler).

II

The boundaries of the Nisqually Indian Reservation are as shown on a map marked "Exhibit A" attached hereto and by reference incorporated herein.

III

The usual and accustomed fishing grounds (within the meaning of the Treaty of Medicine Creek, *supra*) of the Nisqually Tribe of Indians encompass the whole of the Nisqually River, and its tributaries downstream from the Nisqually Indian Reservation as described in Paragraph 2, above.

IV

The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fishing conservation laws and regulations.

V

If permitted to continue, the defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.

VI

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn. 2d 423 (1963)] that the plaintiffs' enforce state fishery conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

FROM THE FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

I

It is reasonable and necessary that state conservation laws, rules and regulations be uniformly applied

to all citizens on an equal basis including the defendants.

II

That to permit the defendants to fish as they have done since 1960, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Nisqually River watershed.

III

That the defendants should be permanently enjoined from fishing in the Nisqually River, without the boundaries of the reservation, in any manner contrary to the laws, rules and regulations of the State of Washington.

DONE IN OPEN COURT THIS 13th day of August, 1965.

/s/ JOHN D. COCHRAN
Judge of the Superior Court

JUDGMENT AND DECREE OF THE SUPERIOR COURT

The above-entitled matter having come on regularly for trial and hearing on stipulated facts before the undersigned judge, sitting without a jury on the 13th day of August, 1965, the plaintiffs being represented by John J. O'Connell Attorney General, and Joseph L. Coniff and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Jack E. Tanner and the court having examined the stipulation of facts and heard the arguments of counsel and being fully advised in the premises and having entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

The defendants are hereby permanently enjoined from fishing in the Nisqually River watershed, without the boundaries of the Nisqually Reservation as stipulated in the facts, in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That plaintiffs shall recover their costs and disbursements herein.

DONE IN OPEN COURT THIS 13th day of August, 1965.

/s/ JOHN D. COCHRAN
Judge of the Superior Court

DECISION OF THE SUPREME COURT
January 12, 1967

HILL, J.—This is an action by the Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinfater called the Departments, against 12 named individuals and a John Doe, all of whom it is alleged, "have threatened and are fishing extensively in the Nisqually River with set nets and drift nets," under a claim of special privileges or immunities from the conservation laws of the State of Washington.

The Departments alleged that if the defendants' net fishing was permitted to continue the anadromous fish[1] runs of the Nisqually River would be virtually exterminated.

The Departments sought a judgment, holding that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that they be restrained from netting anadromous fish in the Nisqually River or any of its tributaries.

The Nisqually Tribe[2] and the Puyallup Tribe, with numerous others, were signators to the Treaty of Medi-

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[1]For an understanding of an "anadromous" fish, see opinions by Judge Rosellini in *State v. McCoy*, 63 Wn.2d 421 at page 426 *et seq.*, 387 P.2d 942 (1963), and his concurring opinion in *State c. Satiacum*, 50 Wn.2d 513, 531 *et seq.*, 314 P.2d 400 (1957).

[2]The Nisqually Tribe was not made a defendant in this action. The trial court entered an order "that the Nisqually Indian Tribe be and is hereby joined as a party defendant to this cause and it is further ordered that they be so summoned." The only proof of being "summoned" is that a copy of the order was served on the wife of the chairman of the Nisqually Indian Community Council at his residence. The tribe never appeared; no default was ever entered.

cine Creek and entitled to certain rights thereunder, which rights have previously been discussed in the companion case (No. 38611) filed this day involving the Puyallup Tribe of Indians (70 W.D.2d 241, —P.2d—).

In this case, there is no question as to the continuation of the Nisqually Tribe or as to the existence of the Nisqually Indian Reservation.

It is stipulated that the defendants are Nisqually Indians and that "usual and accustomed fishing grounds"[3] (within the meaning of the Treaty of Medicine Creek) encompass the whole of the Nisqually River and its tributaries downstream from the reservation.

It is stipulated further:

> 4) The defendants began engaging in an open net fishery for salmon and steelhead at the usual and accustomed grounds in 1960, and have, since that date, continued to fish contrary to state fihing conservation laws and regulations.
>
> 5) If permitted to continue, the defendants commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River.
>
> 6) The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Nisqually River and it is necessary for proper conservation of the salmon and steelhead fish runs of the Nisqually River [within the meaning of *State v. McCoy*, 63 Wn.2d 423 (1963)] that the plaintiffs enforce state fishery

[3]The Medicine Creek Treaty refers to "all usual and accustomed fishing grounds and stations."

conservation laws and regulations to the fishing activities of the defendants at their usual and accustomed grounds.

We have here the extreme case: It is stipulated that the "defendants' commercial fishery would virtually exterminate the salmon and steelhead fish runs of the Nisqually River"; that the enforcement of the conservation laws and regulations are necessary for the proper conservation of the salmon and steelhead fish runs; nevertheless, the defendants asserted in the trial court and assert here that their right to fish as they please is not subject to any interference by the Departments. They challenged the jurisdiction of the superior court to consider the cause of action and its right to restrict in any way their treaty rights.

The superior court held that it did have the jurisdiction to hear the matter and permanently enjoined the defendants[4] from fishing in the Nisqually River watershed without the boundaries of the Nisqually Reservation in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Departments.

[1] We agree with the trial court that it did have jurisdiction to hear the cause and to enter its order. When Indians seek to enjoin claimed interference with their treaty rights, they usually invoke the jurisdiction of the federal courts, as did the Makah Tribe in the

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[4]The state asserts in its brief (p. 4) that the Nisqually Tribe was joined as an additional party defendant and is bound by the injunction. See Note 2 for the only indication in the record that the tribe was made a party defendant. We do not pass upon the issue of whether the tribe is included in the defendants, who are enjoined.

Schoettler[5] and *McCauley*[6] cases, and the Confederated Tribes of the Umatilla Reservation in the *Maison*[7] case.

When a state seeks to enforce its laws and the regulations made thereunder, in furtherance of its police power, to conserve its fish and game, it invokes the jurisdiction of the state courts as in the *Tulee*,[8] *Becker*[9] and *Race Horse*[10] cases, and the claimed interference with treaty rights becomes a matter of defense.

The United States brought one action to enforce Indian treaty rights in our territorial court,[11] and another in the Circuit Court of the United States for the District of Washington.[12]

In the final analysis, irrespective of which route has been pursued—federal courts or territorial and state courts—the Supreme Court of the United States can be requested to determine the rights of the contesting parties, if an interpretation of a treaty between an Indian tribe and the United States is involved.

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[5]*Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

[6]*McCauley v. Makah Indian Tribe*, 128 F.2d 867 (9th Cir. 1942).

[7]*Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 163).

[8]*Tulee v. Washington*, 315 U. S. 681, 86 L. Ed. 1115, 62 Sup. Ct. 862 (1941)

[9]*New York ex rel. Kennedy v. Becker*, 241 U. S. 556, 60 L. Ed. 1116, 36 Sup. Ct. 705 (1916).

[10]*Ward v. Race Horse*, 163 U. S. 504 (1896).

[11]*United States v. Taylor*, 3 Wash. Terr. 88 (1887).

[12]*United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. 662 (1905).

We find nothing in any of the cases dealing with Indian treaty rights which would indicate that a state does not have jurisdiction over a violation of its conservations laws or the regulations issued thereunder by an Indian at a locus in quo within the state and outside a reservation. Should the state trial court and this court fail to properly interpret the off-reservation treaty rights of an Indian, the Supreme Court of the United States is available for a final determination. A state court has the right to be wrong in such a case, and we find no support for the challenge of the defendants to the jurisdiction of the superior court.

We have considered in the companion *Puyallup* case, *supra*, the extent of the rights of Indians to fish at "all usual and accustomed grounds and stations," accorded them by the various treaties, and have concluded that their off-reservation fishing rights are—together with those of other citizens of the state—subject to regulations necessary for the preservation of the fishery. Repetition of that discussion would seem to be unnecessary.

The defendants having stipulated that their commercial fishing, if permitted to continue, would virtually exterminate the salmon and steelhead fish runs; and that the enforcement of the regulations of the Departments is necessary for proper conservation of the salmon and steelhead fish runs, it would follow that their fishing in violation of those regulations should be enjoined.

Apparently the reason for an appeal, in the face of such stipulations, is to raise the jurisdictional issue (already disposed of) and the issue raised by the language in the opinion in *Maison v. Confederated Tribes of the Umatilla Indian Reservation* (see note 7), which

would place upon the state the burden of showing that its particular regulation or regulations limiting the off-reservation fishing rights reserved by the treaties[13] must be "indispensable" to accomplish the purpose for which they are intended — the preservation of the fishery.

We have, in the *Puyallup* case, *supra*, indicated our disagreement with the "indispensable" test and our adherence to the "reasonable and necessary" test, as stated in *State v. McCoy* (see note 1).

While we agree that under the stipulation an injunction was proper, it should not be permanent. The stipulation was not that *all future* state conservation laws and regulations will be necessary for the proper conservation of the salmon and steelhead fish runs, and the injunction should apply only to violations of the statutes and regulations stipulated to be presently necessary to the conservation of the salmon and steelhead fish runs on the Nisqually River. In view of the scope of the stipulations, the tailoring of the injunction to meet a specific situation, as in the *Puyallup* case, *supra*, is not necessary.

The cause will be remanded to the superior court for a proper limitation of the injunction. The respondents will recover their costs on this appeal, the remand not being on any issue raised by the appellants.

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[13]Whether the off-reservation fishing rights are reserved to the Indians by the treaty, or granted to them by the treaty, may become of importance. Our own Territorial Supreme Court (see Note 11) in an opinion written by Associate Justice John P. Hoyt in 1887, held that they were reserved rights; and the Supreme Court of the United States expressed the same view in *United States v. Winans* (see note 12).

FINLEY, C. J., WEAVER and HAMILTON, J., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—This case involves the treaty rights of the appellant Nisqually Indians to fish at the usual and accustomed fishing grounds and stations under the Treaty of Medicine Creek.

I agree with the majority in holding that the trial court had jurisdiction of this controversy, but I do not agree with the majority's disposition of this case for the reasons stated by me in the companion case (No. 38611) involving the Puyallup Tribe (70 W.D.2d 241).

In the instant case, appellants have stipulated to the facts quoted in the majority opinion. It seems ironic that appellants in this case have thus admitted facts which, in my opinion, the respondent state departments were unable to prove by a preponderance of the evidence in the *Puyallup* case.

Nevertheless, I would reverse the trial court's injunctive decree and direct that the action be dismissed for the three reasons which I stated in the *Puyallup* cases. Even with the facts admitted in the stipulation, the reasons which I discussed therein are still applicable to the present case.

The majority opinion states that, if this court fails to interpret correctly appellants' treaty rights to fish off the reservation, the United States Supreme Court is available for a final determination of the case. This is theoretically true, but we should not overlook the fact that the Supreme Court has twice declined to review either of two cases (one from a state supreme court and one from a United States court of appeals) in which the constitutional status of a similar Indian treaty was brought into question.

See *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), in which certiorari was denied 347 U. S. 937, 98 L. Ed. 1087, 74 Sup. Ct. 627 (1954), and *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), in which certiorari was denied 375 U. S. 829, 11 L. Ed. 2d 60, 84 Sup. Ct. 73 (1963).

Nevertheless, the important questions involved in the present two companion cases would seem to justify an authoritative determination of the constitutional status of these Indian treaties by the only tribunal competent to finally decide them.

HUNTER, J. (dissenting)—I dissent to the modification of the trial court's injunction for the same reasons stated in my dissent to *Department of Game v. Puyallup Tribe*, 70 W.D.2d 241, —P.2d— (1967).

ROSELLINI and HALE, J., concur with HUNTER, J.